Ngu Toh Tung & Ors v Superintendent of Lands & Survey, Kuching Division, Kuching & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–01–81 OF 2000
GOPAL SRI RAM, MOHD GHAZALI AND HASHIM YUSOFF JJCA
19 SEPTEMBER 2005

Civil Procedure — Certiorari — Appeal against order refusing an order of certiorari — Whether an infringement of the law per se insufficient — Whether appellants had not suffered any substantial injustice

Land Law — Acquisition of land — Objection against acquisition — Whether acquisition was unlawful and should be quashed because of long delay of 26 years between date of notice and date of award — Sarawak Land Code ss 47, 48 & 60(1)(a)

This appeal was directed against the decision of the High Court at Kuching refusing an order of certiorari to quash an award made by the Superintendent of Lands and Surveys, Sarawak ('the first respondent') pursuant to s 51 of the Sarawak Land Code ('the Code') in respect of Lot 190, Block 5, Muara Tebas Land District and to quash the compulsory resumption proceedings, including the notice given under s 47 and the declaration made under s 48 of the Code. So far as the quantum of compensation was concerned, the relevant provision was s 60(1)(a) of the Code. The appellants were the owners of the subject land. They purchased it in 1980. At the time they bought it, the Minister of Planning and Resource Management ('the second respondent') had already acted under s 47 of the Code and issued a notice pursuant to that section. That happened in 1973. The appellants knew about this when they bought the land. Although the s 47 notice was issued in 1973, the second respondent acted under s 48and issued a notice pursuant to that section only in 1996 and thereby acquired the subject land. The first respondent made his award for this acquisition on 26 March 2000. He awarded compensation of RM100,000 per acre to the appellants in respect of the subject land. It was the appellants' case that the acquisition was unlawful and should be quashed because of the long delay of 26 years between the date of the s 47 notice and the date of the award.

Held, dismissing the appeal:

(1) On the basis of the decision in *Superintendent of Lands & Surveys Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 585, there was no acquisition in 1973. It was quite plain that there was no acquisition until 1996 when the second respondent acted pursuant to s 48 (see para 9).

(2) The appellants' repeated complaint was the long delay between the s 47 notice and the s 48 declaration. Since that was their case, they ought therefore to have moved the court in 1996 to have the s 47 notice quashed so soon after the s 48 declaration was made. There was no explanation for their failure to make an earlier challenge and the appellants were bound to provide it. Instead of challenging the s 47 notice, the appellants adopted a wait and see approach to the first respondent's award. If the award had been what they expected they

would probably have kept silent. It was only because the award of RM100,000 per acre was not up to their expectation that they commenced the present proceedings. That was a fair inference to be drawn from the appellants' conduct. It was for the appellants to offer an explanation as to why they did not move as early as 1996. Since they have not, they were at risk of the court exercising its discretion against them (see para 11).

(3) An infringement of the law per se is insufficient unless it visits or is likely to visit a substantial injustice upon the appellants. If it does not, then the court is entitled to refuse certiorari. The appellants had not suffered any substantial injustice as a result of the first respondent's unlawful decision. In fact, the appellants had benefited by the erroneous decision. They ought, on a strict application of s 60(1)(a) of the Code to have received compensation of only RM5,000 per acre. Instead they have received 20 times that sum. The appellants were still unhappy with that award. That was something that goes to quantum. And as far as the quantum of compensation is concerned, there is the special remedy by way of land reference provided by the Code. In such circumstances, it was not competent for the appellants to move the High Court for judicial review (see paras 12–13).

[Bahasa Malaysia summary

Rayuan ini diarahkan terhadap keputusan Mahkamah Tinggi Kuching yang menolak perintah certiorari untuk membatalkan award yang dibuat oleh Penguasa Tanah dan Tinjauan, Sarawak ('responden pertama') menurut s 51 Kanun Tanah Sarawak ('Kanun tersebut') berkaitan Lot 190, Blok 5, Daerah Tanah Muara Tebas dan untuk membatalkan prosiding 'compulsory resumption', termasuklah notis yang diberikan di bawah s 47 dan deklarasi yang dibuat di bawah s 48 Kanun tersebut. Setakat mana kuantum pampasan adalah berkaitan, peruntukan yang relevan adalah s 60(1)(a) Kanun tersebut. Perayu-perayu merupakan pemilik tanah yang dipersoalkan. Mereka telah membelinya pada tahun 1980. Semasa membelinya, Menteri Perancangan dan Pengurusan Sumber (responden kedua') telah pun bertindak di bawah s 47 Kanun tersebut dan telah mengeluarkan satu notis menurut seksyen tersebut. Itu berlaku pada tahun 1973. Perayu-perayu mengetahui tentangnya semasa membeli tanah tersebut. Meskipun notis s 47 dikeluarkan dalam tahun 1973, responden kedua telah bertindak di bawah s 48 dan mengeluarkan satu notis menurut seksyen itu hanya dalam tahun 1996 dan oleh demikian memperoleh tanah yang dipersoalkan. Responden pertama telah membuat award beliau untuk perolehan ini pada 26 Mac 2000. Beliau memberikan award pampasan sebanyak RM100,000 seekar kepada perayu-perayu berhubung tanah tersebut. Adalah kes perayu-perayu yang mana perolehan tersebut adalah menyalahi undang-undang dan patut dibatalkan kerana lewat 26 tahun antara tarikh notis s 47 dan tarikh award.

Diputuskan, menolak rayuan tersebut:

(1) Berdasarkan keputusan dalam kes *Superintendent of Lands & Surveys Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 585, tiada perolehan dalam tahun 1973. Adalah nyata tidak terdapat sebarang perolehan sehingga 1996 apabila responden kedua bertindak menurut s 48 (lihat perenggan 9).

(2) Aduan perayu-perayu yang berulang kali adalah berhubung kelewatan antara notis s 47 dan deklarasi s 48. Memandangkan ia kes mereka, sepatutnya mereka memohon mahkamah dalam tahun 1996 untuk membatalkan notis s 47 sejurus selepas deklarasi s 48 dibuat. Tidak terdapat sebarang penjelasan untuk kegagalan mereka mencabar lebih awal dan perayu-perayu terikat untuk berbuat demikian. Tanpa mencabar notis s 47, perayu-perayu sebaliknya telah membuat pendekatan tunggu dan lihat terhadap award responden pertama. Jika award itu apa yang dijangkakan oleh mereka maka mereka mungkin akan berdiam diri. Oleh sebab award tersebut adalah sebanyak RM100,000 seekar bukan apa yang mereka harapkan, mereka telah mulakan prosiding ini. Ia adalah inferens yang adil daripada perlakuan perayu-perayu. Perayu-perayu hendaklah memberikan penjelasan kenapa tiada tindakan seawal 1996. Memandangkan begitu, mereka hendaklah menghadapi risiko yang mahkamah akan menggunakan budi bicaranya menentang mereka (lihat perenggan 11).

(3) Suatu perlanggaran undang-undang per se tidak memadai kecuali jika telah atau mungkin berlaku ketidakadilan ketara terhadap perayu-perayu. Jika tidak, maka mahkamah berhak menolak certiorari. Perayu-perayu tidak mengalami apa-apa ketidakadilan ketara akibat daripada keputusan responden pertama yang menyalahi undang-undang. Bahkan, perayu-perayu mendapat faedah daripada keputusan silap itu. Mereka sepatutnya, berdasarkan pemakaian ketat s 60(1)(a) Kanun tersebut menerima pampasan sebanyak RM5,000 seekar sahaja. Sebaliknya mereka menerima 20 kali ganda jumlah tersebut. Perayu-perayu masih tidak gembira dengan award tersebut. Ia suatu yang dikira sebagai kuantum. Dan setakat mana kuantum pampasan adalah berkaitan, terdapat remedi khas melalui rujukan tanah yang diperuntukkan oleh Kanun tersebut. Dalam keadaan sedemikian, adalah tidak kompeten untuk perayu-perayu memohon Mahkamah Tinggi untuk kajian semula kehakiman (lihat perenggan 12–13).]]

Notes

For cases on objection against acquisition, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1772–1774.

Cases referred to

Clara Tai Saw Lan v Kurnia Insurans (M) Bhd [2001] 1 MLJ 497 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor [1997] 2 MLJ 602 (refd)

Pasmore v Oswaldtwistle Urban District Council [1898] AC 387 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Sangram Singh v Election Tribunal AIR 1955 SC 425 (refd)

Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo & Anor [1980] 1 MLJ 585 (refd)

Legislation referred to
Sarawak Land Code ss 47, 48, 51, 60(1)(a)

Appeal from: Originating Motion No 255-10 of 2000-I (High Court, Kuching)

Chong Siew Chong (Lai Peng Seng with him) (Lai & Co) for the appellants.
Susan Gau (Sarawak Legal Officer) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal is directed against the decision of the High Court at Kuching refusing an order of certiorari to quash Award No 129/2000 made by the Superintendent of Lands and Surveys, Sarawak (the first respondent before us) pursuant to s 51 of the Sarawak Land Code('the Code') in respect of Lot 190, Block 5, Muara Tebas Land District and to quash the compulsory resumption proceedings, including the notice given under s 47 and the declaration made under s 48 of the Code. The history of the matter is as follows.

[2] The appellants are the owners of the subject land. They purchased it in 1980. At the time they bought it, the Minister of Planning and Resource Management (the second respondent before us) had already acted under s 47 of the Code and issued a notice pursuant to that section. That happened in 1973. The appellants knew about this when they bought the land. Now, s 47 says this:

> 47 (1) Whenever the Governor in Council passes a resolution that land in any locality is likely to be needed for any of the purposes specified in section 46, the Superintendent shall cause a public notice of the substance of such resolution to be given at convenient places in such locality, and thereupon any officer or other person either generally or specially authorised by the Governor in Council in this behalf and his servants and workmen may enter upon such land and may survey, bore, take levels, set out and mark boundaries, and do all other acts necessary to ascertain whether the land is suitable for such purpose.
>
> (2) As soon as conveniently may be after such entry, the Superintendent shall assess the compensation for damage resulting therefrom.
>
> (3) Such compensation shall not become payable so far as it relates to any land which is resumed under section 48 and, if paid, shall be refunded to the Crown on demand by the Superintendent.
>
> (4) If there is any dispute as to the amount of any compensation which has become payable, the persons to whom it is payable or the apportionment of the compensation, such dispute shall, if any person interested so requires, be referred to arbitration in accordance with the provisions of section 212.

[3] The section is plain in its terms. It merely enables an inspection of the land. If in the course of that inspection some damage is caused to the land then the acquiring authority must pay damage if no further step to acquire the land is taken. But if the land is acquired then no compensation for the damage caused is payable, or if paid, must be refunded. It follows that any action taken under s 47, it does not amount to an acquisition.

[4] But s 48 is different. It puts the acquisition on foot. And this is what it says.

48 (1) Whenever it appears to the Governor in Council that any particular land is needed for any of the purposes specified in section 46, the Clerk of Councils shall make a declaration to that effect.

(2) The declaration shall be posted in the office of the Superintendent and of the District Officer and shall state the situation of the land, the particular purpose for which it is needed, its approximate area and all other particulars necessary for identifying it and also the place where a plan of the land, if any has been made, may be inspected. Such declaration shall be conclusive evidence that the land is needed for the purpose specified therein.

(3) Upon the posting of such declaration an entry thereof shall be made in the Register in respect of the land affected.

[5] So far as the quantum of compensation is concerned, the relevant provision is s 60(1)(a) of the Code which provides as follows:

60 (1) In determining the amount of compensation to be awarded for land resumed under this Part, the court shall take into consideration —

(a) the market value at the date of the publication of the notification under section 47 or, if no such notification has been published, the market value at the date of the posting of the declaration made under section 48.

[6] In *Superintendent of Lands & Surveys,. Fifth Division, Limbang v Lim Teck Hoo & Anor* [1980] 1 MLJ 58, Chang Min Tat FJ explained the way in which these three sections work and I would gratefully adopt as my own views what his lordship there said:

Section 47 read with section 60(1)(a), on a proper construction, has the effect of freezing the valuation of the land intended to be resumed by the Government at the date of the publication of the resolution passed by the Governor in Council that the land in question is likely to be needed for any of the purposes specified in section 46. It starts the train of events leading to the formal resumption of the alienated land by the Government. The Government may then enter on the land for all the purposes of ascertaining the suitability of the land for resumption for the purposes stated in the notification, with the right however reserved to the landowner to compensation for damage resulting from such entry into occupation, which right vanishes and compensation for such damage is not payable when and if the land is resumed under section 48. Section 47 is not therefore the final act of resumption. Despite such a notification, the Government may yet decide not to proceed with the resumption of the land.

Section 48 is however such a final act of resumption, or the first step in the final act of resumption. It operates as a declaration that the land is required for a public purpose, and upon its issuance, an entry is made in the Register. The various processes of the drawing of plans, of requiring parties to state their names and interests and of an enquiry into and award of the amount of compensation (ss 49, 50 and 51) follow from the Superintendent taking possession of the land under section 53.

[7] To revert to the facts of the present case for a moment, it is not in dispute that in 1985 the appellants surrendered part of the subject land to the State Government for the purpose of road construction. The State did construct the road. That gave the appellants' subject land a road frontage which it previously lacked. As a result the value of the subject land increased in value and the appellants obtained a benefit. This is frankly conceded by learned counsel for the appellants.

[8] Although the s 47 notice was issued in 1973, the second respondent acted under s 48 and issued a notice pursuant to that section only in 1996 and thereby acquired the subject land. The first respondent made his award for this acquisition on 26 March 2000. He awarded compensation of RM100,000 per acre to the appellants in respect of the subject land. These are the facts that form the substratum of the appellants' complaint. It is their case that the acquisition is unlawful and should be quashed because of the long delay of 26 years between the date of the s 47 notice and the date of the award.

[9] Now, when I first heard that argument I thought that there was something wrong with it. What the appellants assume is that there was an acquisition afoot in 1973. That is an incorrect assumption. On the basis of the decision in *Superintendent of Lands & Surveys, Fifth Division, Limbang v Lim Teck Hoo* there was no acquisition in 1973. It is quite plain that there was no acquisition until 1996 when the second respondent acted pursuant to s 48.

[10] But, say the appellants, the award of the second respondent is contrary to s 60(1)(a) of the Code. This is because the award of RM100,000 does not come within the first limb of s 60(1)(a) as it is not the value of the subject land as at the date of the notice issued under s 47 of the Code. That notice had the effect of freezing the value of the subject land at RM5,000 per acre. The award also does not come within the second limb of s 60(1)(a) of the Code because it is not the market value of the land as at the date of the s 48 declaration.

[11] At first brush, this argument appeared to have some merit. But on closer examination I am satisfied that there it suffers from a fundamental error. The appellants' repeated complaint before us is the long delay between the s 47 notice and the s 48 declaration. Since that is their case, they ought therefore to have moved the court in 1996 to have the s 47 notice quashed so soon after the s 48 declaration was made. There is no explanation for their failure to make an earlier challenge and I think that the appellants are bound to provide it. Instead of challenging the s 47 notice they adopted a wait and see approach to the first respondent's award. If the award had been what they expected they would probably have kept silent. It is only because the award of RM100,000 per acre was not up to their expectation that they commenced the present proceedings. I think that is a fair inference to be drawn from the appellants' conduct. I also think that it is for the appellants to offer an explanation as to why they did not move as early as 1996. Since they have not, they are at risk of the court exercising its discretion against them.

[12] The appellants are quite correct in their submission that the first respondent's award is contrary to s 60(1)(a) of the Code. But an infringement of the law per se is insufficient unless it visits or is likely to visit a substantial injustice upon the appellants. If it does not, then the court is entitled to refuse certiorari. And this brings into sharp focus an aspect of public law remedies that is often overlooked. No doubt, the public law remedy of certiorari appears in the vast majority of cases to have been granted as of right once an infringement of the law was demonstrated. So, one tends to assume that it is a remedy of right. But it is not. If you look carefully enough at those cases where the remedy was granted, you will find that they concerned applicants who had suffered or were likely to suffer a substantial injustice in

consequence of a breach of law. In my considered judgment, the correct approach to public law remedies is that stated by Bose J in *Sangram Singh v Election Tribunal AIR* 1955 SC 425 at p 429:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that *they will not exercise jurisdiction in this class of case unless substantial injustice has ensued*, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. (Emphasis added.)

I need only add that the foregoing passage has been applied by our courts on a number of occasions (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602; *Clara Tai Saw Lan v Kurnia Insurans (M) Bhd* [2001] 1 MLJ 497; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[13] Now what substantial injustice have the appellants suffered as a result of the first respondent's unlawful decision? The answer is: none whatsoever. In fact, they have benefited by the erroneous decision. They ought, on a strict application of s 60(1)(a) of the Code to have received compensation of only RM5,000 per acre. Instead, they have received 20 times that sum. The appellants are still unhappy with that award. That is something that goes to quantum. And as far as the quantum of compensation is concerned, there is the special remedy by way of land reference provided by the Code. In such circumstances, it is not competent for the appellants to move the High Court for judicial review. As observed by Lord Halsbury in *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387:

> The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v Bridges* (1 B & Ad 847) at p 859. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' The words which the learned Lord Tenterden J, uses there appear to be strictly applicable to this case. The obligation which is created by this Statute is an obligation which is created by the Statute and by the Statute alone. It is nothing to the purpose to say that there were other Statutes which created similar obligations, because all those Statutes are repealed; you must take your stand upon the Statute in question, and the Statute which creates the obligation is the Statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department.

[14] For the reasons already given, I would dismiss this appeal with costs and affirm the orders made by the court below. The deposit shall be paid out to the first

respondent to account of taxed costs. My learned brothers, Mohd Ghazali and Hashim Yusoff JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Peter Ling